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P. James Mackill

June 28. 1766.

To Ordinary mentioned accordingly & the same ingrossed in hand Law record & Warrant thereby Sic.

See

Unto the Right Honourable the Lords of Council and Session,

THE

PETITION

OF

James Mackill in Trochiehouse,

Humbly sheweth,

THAT in *December* 1762, *Anthony Maclurg* in *Craignell* became bankrupt; ultimate Diligence was taken out against him by his Creditors; and he was obliged to apply to them for a *supersedere*; in order to obtain which, he proposed to them, to grant a Trust-disposition of his Tack and Stocking, and prevailed with several of his Creditors to sign, of this Date, a *supersedere*, on a Narrative that his Creditors and he had mutually chosen *Robert Ker*, *John Brown*, *John Maclurg* in *Glenshalloch*, and *John Maclurg junior* in *Auchinleck*, the Father and Brother of the Bankrupt, as their Trustees for the faithful Management and Disposal of his Stock, Tack, and other Moveables. But to this Deed the Petitioner, who is Creditor to *Maclurg* in *L.* 51 *Sterling*, is not a Party or Consenter.

several of his creditors is Mackill & only one not acceding to Lord Down's Deliverance on their Bill. Dec. 15. 1762. Check of the pleadings in A. Mackill's witness. he gained only by the Court

That, in prosecution of this Plan, the said Bankrupt granted a Trust-disposition, of this Date, to the Persons above named accordingly, with a Preference, however, to three Debts, Feb. 8. 1763.

one of which is due to the ſaid *John Maclurg* in *Glenſhalloch*, and aſſigned to *John Maclurg* younger.

That the Petitioner having obtained Decreet againſt *Anthony Maclurg* the Bankrupt, for Payment of *L.* 51 *Sterling*, contained in his accepted Bill, arreſted in the Hands of *Andrew Macclameroch*, and obtained Decreet of Forthcoming againſt him as Debtor to *Maclurg*.

That in this Action *Macclameroch* having been perſonally cited, was held as confeſſed for not Compearance: But being in concert with the Truſtees, and deſirous to prefer them, he ſuſpended upon this Ground, that at the Time of the Arreſtment, he owed nothing to *Maclurg*, the common Debtor; for though he had bought Goods which were originally his, yet he did not buy them from him, but from the Truſtees for his Creditors, and to whom, on Delivery, he became bound for the Price, and ſo could not be obliged to make it forthcoming to the common Debtor himſelf, or to any particular Creditor, of his taking ſeparate Meaſures.

That when the Petitioner wanted to have this Suſpenſion diſcuſſed, he was told, that a Multiplepoinding was coming in, in which the Truſtees and he were called, in order to have the Preference determined: And this Multiplepoinding having at laſt made its Appearance, and being conjoined with the Suſpenſion, *Macclameroch*, after innumerable Delays, appeared, and emitted the following Depoſition: "That in "*March* 1763, the Truſtees of *Andrew Maclurg* ſent for the "Deponent to *Clatternſhaws*, in order to purchaſe the Stock "of *Craignell*; when he came there, the Price of the Stock "was referred, by the Writing in Proceſs, to *John Wallace* "in *Corlae*, and *David Macmillan* of *Auchinſkinnoch*, and o-"thers, which is ſigned by the Deponent, and two of the "Truſtees, which were the only Truſtees then preſent, *toge-*"*ther with Anthony Maclurg, the common Debtor*, who was "no Party to this Tranſaction: That, about *Whitſunday* "thereafter, the Referrees ſtruck a Price on the Stock, *and*

John

" *John Brown, one of the Truſtees, deſired Andrew Maclurg*
" *to wiſh the Deponent Luck of the Bargain; which he accor-*
" *dingly did, by ſtriking his Hand in the Deponent's*; but the
" Deponent underſtood the Bargain to be made with the
" Truſtees: That when the Sheep were delivered, and the
" Mark altered, there were preſent *John Brown*, one of the
" Truſtees, the common Debtor, and a Number of other
" People. Depones, That the Price of the whole Stock pur-
" chaſed by him extended to at leaſt *L.* 175 *Sterling*.
" Depones, That, at the Date of the Arreſtment libelled, the
" whole Price was in the Deponent's Hands. Depones, That
" ſome ſhort Time after this, *John Brown* and *John Mac-*
" *lurg*, two of the Truſtees, came to the Deponent, and de-
" ſired his Acceptance for the above Stock's Price; which the
" Deponent refuſed, in reſpect of the Arreſtment above men-
" tioned: Upon this the Truſtees aforeſaid agreed to allow
" *L.* 60 *Sterling* to lie in the Deponent's Hands, which they
" ſaid was ſufficient to purge the Arreſtment; which was ac-
" cordingly done. *Depones, That he granted Bills for the Re-*
" *mainder of the ſaid Price to* Anthony Maclurg, *the common*
" *Debtor; which he immediately indorſed to* John Brown *in*
" Craigencally, *and* John Maclurg *younger in* Glenſhalloch,
" *being the two Truſtees above mentioned.* Depones, That
" when the Deponent raiſed the Suſpenſion in this Proceſs,
" *John Brown* and *John Maclurg* aforeſaid, gave the Depo-
" nent a miſſive Letter, to relieve him of the Effect of the
" Proceſs, the Deponent having refuſed to allow the Suſpen-
" ſion to be raiſed in his Name, without getting ſuch Letter.
" And depones, That, at the Date of the Arreſtment, he
" was no otherwiſe Debtor than as above mentioned. And
" this is the Truth," *&c.*

That after making Aviſandum with, and conſidering this Oath, the Lord Ordinary ordained Parties to give in Memorials. The Truſtees having in theirs alledged, that the Petitioner had acceded to the Truſt-right, which he denied, his

Lordſhip

Lordſhip ordained the Truſtees to give in a Condeſcendence of the Circumſtances from which they inferred his Acceſſion; and after adviſing the Condeſcendence, with Anſwers, his
Feb. 6. 1766. Lordſhip pronounced the following Interlocutor: "Having "conſidered this Condeſcendence, with Anſwers thereto, is "of Opinion, that the Facts ſtated are not relevant to infer "the Acceſſion of *James Mackill* to the Truſt-right, or even "his Acquieſcence; and therefore refuſes to admit the ſame "to Proof."

Againſt this Interlocutor the Truſtees preferred a Repreſentation, praying the Lord Ordinary to review that Interlocutor, and to reſerve the Conſideration of the Condeſcendence till the Cauſe was adviſed on the mutual Memorials. This Repreſentation the Lord Ordinary ordained to be ſeen and
Feb. 25. anſwered; and, of this Date, thereafter pronounced the following Interlocutor: "Having conſidered the Proceſs of Mul- "tiplepoinding, the foregoing Memorial, with the Memo- "rial for the Truſtees, in reſpect that when *James Mackill* "arreſted in the Hands of *Andrew Macclameroch*, as Debtor "to *Anthony Macluſg*, the ſaid *Andrew* was not Debtor to "*Macluſg*, but to the Truſtees for his Creditors, who ſold "the Stocking to him, and took the Price payable to them- "ſelves, for Behoof of the Creditors; therefore prefers the "Truſtees to the Sums in the Hands of the Purſuer of the "Multiplepoinding, and decerns in the Preference, and a- "gainſt the Purſuer for Payment accordingly."

That againſt this Interlocutor, the Petitioner preferred a Repreſentation; on adviſing which, with Anſwers, his Lord-
June 18. ſhip pronounced an Interlocutor, refuſing the Deſire of the Repreſentation, and adhering to his former Interlocutor, reſerving Reduction of the Truſt-right as accords. And of theſe Judgments the Petitioner craves a Review.

As the Court has of late Years had many Caſes before them, in which the Validity of Truſt-diſpoſitions was canvaſſed, it would be unneceſſary and improper to repeat here

the many good Arguments that have been urged againſt ſuſtaining them. In the noted Caſe of *Snee* againſt the Truſtees of *Macbeth Anderſon*, determined 12th *July* 1734, the Court ſet aſide a Truſt-diſpoſition from a Bankrupt: And it is obſerved in the Diſtionary, *vol.* 1. *p.* 85. in the Margin, "That the Lords, at the ſame time, laid hold of this Op"portunity to declare their Sentiments againſt all ſuch Diſ"poſitions in general;" and in that View cauſed inſert the following Clauſe in the Interlocutor. "And further find, "that no Diſpoſition by a bankrupt Debtor, can diſable "Creditors from doing Diligence." The like Judgment was again given in the Caſe, the Earl of *Aberdeen* againſt *Blair*'s Truſtees, 3d *February* 1736.

In ſome Caſes indeed certain Effect have been given to Truſt-diſpoſitions, particularly in that of *Jackſon*'s Creditors, 15th *November* 1757, and in the ſtill later Caſe of *Macvicar*; in both which the competing Creditors had arreſted in the Hands of the Truſtees; and the Court only ſuſtained the Truſt-right ſo far as to prevent the Truſtee from being obliged to make forthcoming to the Arreſters thoſe Funds which he was already poſſeſſed of, for Behoof of the Creditors acceding to the Truſt-right. But after very mature Deliberation in *Macvicar*'s Caſe, the Court reſerved to him the Arreſter to inſiſt, as accords, on the other Arreſtments uſed by him in the Hands of ſome of *Baillie*'s Debtors, and only preferred the Truſtee as to the Funds arreſted in his own Hands.

But the general Point was again moſt ſolemnly adjudged, in 1765, againſt Truſt-rights, in the Caſe of *Eliſabeth Moor die contra James Dickſon*, and others, Truſtees of *Robert Strachan*.

Maclurg's Truſtees were pleaſed to alledge, that this Deciſion went on this Speciality, of *Strachan* being bankrupt in terms of the Act 1696; and it is true, that that was alledged, and indeed found by the Lord Ordinary in that Caſe: But your Lordſhips will remember, that the Deciſion did not go

on that Circumſtance, but entirely upon the general Point, which was ſettled in the ſame Way as in the Caſe of *Snee*.

The Truſt-right in queſtion deſerves as little Favour as moſt that have occurred; for *John Maclurg ſenior* and *junior*, Father and Brother to the Bankrupt, are two of the Truſtees, and three Debts, one of them due to *John Maclurg ſenior*, are declared to be preferable. The Apology made for this was, that the Creditors in theſe Debts had ultimate Diligence ready to operate their Payment. This however certainly was not a ſufficient Excuſe for the Partiality; and if it be true, it ſeems to be inconſiſtent with the Allegation, that the Granter was not a notour Bankrupt; beſides, it is liable to another Objection, *viz.* that one of the two Witneſſes to it *John Maclurg*, one of the Perſons in whoſe favours a Preference is unduly eſtabliſhed, as above mentioned, is alſo one of the Diſponees, and therefore could not be a habile Witneſs to a Deed in his own favours, as has been ſeveral times decided, *Dict. vol. 2. p. 559.* So that ſuppoſing the general Point was not againſt Truſt-diſpoſitions, the one in queſtion would be reducible; and as Parties are here in a Multiplepoinding, there is no Occaſion for a formal Reduction, ſuch being implied *hinc inde* in every Multiplepoinding.

No ſpecial Circumſtance occurs in this Caſe, that will induce your Lordſhips to prefer the Truſtees. It does not appear, nor was it ever alledged, that their Diſpoſition was ever intimated, or that they obtained Poſſeſſion of his Moveables upon it, or had uplifted, or even affected the Price in *Macclameroch*'s Hand.

The Lord Ordinary's Interlocutor is founded on this Suppoſition, that at the Time of the Arreſtment *Macclameroch* was not Debtor to *Maclurg*, but to his Truſtees, who ſold the Stocking to him, and took the Price payable to themſelves, for the Behoof of his Creditors.

But,

But, with great Submiſſion, *Macclamerocb*'s Oath, which is the only Evidence upon this Point in Proceſs, ſeems to eſtabliſh a very different Poſition. This Man has all along acted in Concert with the Truſtees, which indeed appears from his Admiſſion in the Cloſe of his Oath; but even from what he ſays, it is apparent, that it was *Maclurg* who ſold the Stocking to him, and that it was to *Maclurg* he was Debtor at the Time of the Arreſtment; for your Lordſhips will obſerve, that he owns *Maclurg* was preſent when he bought the Stocking, and that the Truſtees deſired *Maclurg* to wiſh him Luck of the Bargain, and that he did ſo by taking him by the Hand, which is the common Method among Country People of concluding a Bargain of this kind. He is indeed pleaſed to ſay nevertheleſs, that he underſtood the Bargain to be made with the Truſtees, not with *Maclurg*; but it is thought, that the Circumſtances which he mentions, ſhow that the contrary was the Caſe, and that he had no Reaſon to believe otherwiſe, and that this Obſervation has proceeded from his Inclination to ſerve the Truſtees. For what ſeems to put it out of all Doubt, that he thought he had bargained with *Maclurg*, and was Debtor to him in the Price, is his granting Bills therefor after the Arreſtment, not to the Truſtees, but to *Maclurg* himſelf, who he ſays immediately indorſed them over to the Truſtees. This is irreſiſtible Evidence, that in the Opinion of all concerned, *Maclurg* and his Truſtees, as well as *Macclamerocb*, the latter had bought from, and was Debtor to *Maclurg* himſelf, at the Time of the Arreſtment. When this was laid on *Macclamerocb* admits he had the whole Price in his Hands, and had not granted Bills for it. According to the Lord Ordinary's Interlocutor, the Queſtion is, Whether he was at that Time Debtor to the Truſtees, or to *Maclurg*? *Macclamerocb* has ſaid, he underſtood the Bargain was only with the Truſtees; but his underſtanding cannot alter the Fact, which,

from

from the Circumſtances he himſelf mentions, ſeems to ſtand juſt the other Way.

However, the Petitioner can by no means admit, that the Queſtion depends upon ſuch Circumſtances; the Arreſtee has confeſſedly in his Hands *L.* 60 *Sterling*, being Part of the Price of *Maclurg* the common Debtor's Stocking; that Part of the Price is ſtill *in medio*, not having been uplifted or affected in any ſhape by *Maclurg*'s Truſtees: And therefore, as it is ſettled that a Truſt-diſpoſition cannot diſable Creditors from doing Diligence, the Petitioner, who is Creditor-arreſtee to *Maclurg*, hopes he will be found preferable upon that Sum which is ſtill *in medio* unuplifted and unaffected by he Truſtees.

May it therefore pleaſe your Lordſhips, to alter the Lord Ordinary's Interlocutor, and to prefer the Petitioner to the Sums in Macclameroch's *Hands.*

According to Juſtice, &c.

JO. MACLAURIN.